86-1077

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BATTERY WORLD, INC., *et al.*,

Petitioners,

v.

EXIDE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of The State of Ohio

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

NICHOLAS M. DEVITO
Counsel of Record

1000 Terminal Tower
Cleveland, Ohio 44113
(216) 687-1212

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether a state appellate court, which reviews the cold record, makes its own findings of fact thereon contrary to the jury's findings, and reverses and renders judgment for the appellant, thereby deprives the appellee of its Seventh Amendment right to a jury trial?

2. Whether a litigant, who receives a jury verdict, has a property right in that verdict under the Fourteenth Amendment which prohibits an appellate court from reviewing the record and making its own findings of fact and rendering judgment thereon contrary to the jury's findings?

PARTIES TO THE PROCEEDING

The parties to this proceeding are BATTERY WORLD, INC., DANIEL CHILDERS and JUDITH CHILDERS, Petitioners, and EXIDE CORPORATION, Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

Table of Authorities Continued

OPINIONS BELOW

The Journal Entry at the trial court level showing the jury verdict and the Order of the trial judge, denying the Respondent's Motion for Judgment Notwithstanding the Verdict or in the alternative to Grant a New Trial appear in the Appendix. The opinion of the Court of Appeals is unreported and also appears in the Appendix. The Orders of the Ohio Supreme Court summarily denying Petitioners' Motion to Order the Court of Appeals to Certify its Record, granting Petitioners' Motion for Extension of Time to File its Motion for Rehearing and summarily denying Petitioner's Motion for Rehearing also appear in the Appendix.

JURISDICTION

On May 1, 1986, the Court of Appeals of Ohio, Eighth District, entered its Order reversing the judgment for Petitioners, thereby reversing the jury verdict of $165,000, and entered judgment for Respondent. On May 14, 1986, the Court of Appeals overruled Petitioners' Motion for Reconsideration, and on June 5, 1986, overruled Petitioners' Motion to Certify the action to the Ohio Supreme Court.

On August 25, 1986, the Ohio Supreme court entered its order denying Petitioners' Motion to Order the Court of Appeals to Certify its Record. On September 3, 1986, the Ohio Supreme Court entered its Order granting the Petitioners until September 25, 1986, to file its Motion for Rehearing; such Motion was then timely filed. On October 1, 1986, the Ohio Supreme Court entered its Order denying Petitioners' Motion for Rehearing, and this Petition for Certiorari

was timely filed. Title 28 U.S.C. Section 1257(3) confers jurisdiction on this Court to review this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment and Fourteenth Amendment to the United States Constitution appear in the Appendix.

STATEMENT OF THE CASE

In September 1983, Respondent Exide Corporation (hereinafter Exide) filed its action for breach of contract against Petitioners, Battery World, Inc., Daniel Childers and Judith Childers (hereinafter Battery World). Battery World filed a Counterclaim against Exide also for breach of contract. Between May 2 and May 7, 1985, the matter was tried to a jury. At issue was the existence of an oral contract between Battery World and Exide from July, 1981, through July, 1982, to sell batteries; it being Exide's policy not to have written contracts with its distributors, but only to enter into oral contracts on an annual basis.

Battery World presented the following evidence to prove there was a contract. In July 1981, David Callahan, Battery World's Chief Marketing Executive, went to Exide's Pennsylvania Corporate Headquarters and met with Exide's Vice President of Marketing and Sales, Roy Bradbury. These two men, with full authority, agreed that Exide would sell batteries to Battery World, as a distributor, at the same specific price, terms and conditions as one of Exide's other distributors, Manufacturers Marketing. The Exide Vice President, Roy Bradbury, in the presence of

Mr. Callahan, then ordered Bill Brooks to carry out the terms of this oral agreement. Mr. Brooks executed various Exide forms concerning credit approval, giving Battery World a Customer Code Number, and in early January, 1982, Mr. Mullins, Exide's Credit Manager, informed Battery World through Daniel Childers, President and Chief Executive Officer of Battery World, that final credit approval had been granted as an Exide distributor. Battery World then placed a large order for shipment of batteries in January 1982.

Moreover, in late 1981, another Exide Vice President, Bob Winkleman, took Mr. Childers to Pennsylvania and arranged a meeting with Lane Lanco, a twenty-six store chain outlet for retail automotive batteries. Mr. Winkleman recommended to Lane Lanco that they do business with Battery World, an Exide distributor. Relying on the contract initially agreed upon at Exide in July, 1981, Mr. Childers made a commitment, with full knowledge, assistance and support of Exide, to become the sole supplier for Lane Lanco. The evidence at trial by Exide's own employee was that *Exide breached the contract because it feared that if it sold the batteries to Battery World, as agreed, Exide would lose Manufacturers Marketing as a distributor.* This breach caused Battery World to suffer substantial damages to honor the contracts to Lane Lanco and others.

Based upon this evidence, *inter alia,* the jury found that a contract existed between Battery World and Exide for the period July, 1981, through July, 1982, which Exide breached and returned a verdict for Battery World in the amount of $165,000.00 for damages sustained by Exide's refusal to ship batteries.

After the trial, Exide filed a Motion for Judgment Notwithstanding the Verdict and in the alternative a Motion For a New Trial. Exide based its argument on the Statute of Frauds, claiming there was no written contract and that reliance occurred before the contract was completed. Exide also contended that the verdict was not supported by the weight of the evidence. The trial court *denied* these motions and ruled as follows:

> The Court has reviewed the arguments of counsel and the evidence adduced and finds that there is *sufficient evidence* to permit reasonable minds to reach different conclusions; there is some *evidence of probative value to support the adverse party's claim and defense . . . this Court cannot supplant the judgment of the jury with its own and must refuse to do so.*

(Emphasis added.)

Exide appealed to the Ohio Court of Appeals for the Eighth District. It advanced *only* its Statute of Frauds contentions and relied on no other arguments. The evidentiary matter is irrelevant.

On May 1, 1986, the Court of Appeals rendered its decision. It first "reject[ed] [Exide's] Statute of Frauds argument", and then *sua sponte* concluded that the "only debatable issue was the effective date of this agreement."

The Court of Appeals then proceeded to weigh portions of the record evidence and found that an oral contract came into existence in July 1982. However,

this contract was *never in dispute.*[1] To make such a finding of fact, it opined on page eleven of its decision that Mullins' initials (Exide's Credit Manager) and the January 4, 1982, date on the M-41 internal Exide form for approval of credit were "not conclusive" as to credit approval. Next, it weighed Mr. Childers' testimony against Mr. Brooks' testimony. Then on page twelve of its decision, the Court of Appeals concluded that the "evidence strongly *suggests* that credit was not approved until July of 1982."[2] (emphasis added.)

Based on its rereading of the record and its own erroneous conclusions, the Court of Appeals reversed Battery World's $165,000.00 judgment on its counterclaim. However, it did not remand for a new trial. Thus, the Court effectively rendered judgment for Exide on facts completely opposite to the factual conclusions reached by the jury in its verdict and by the trial court in his ruling denying judgment NOV and denying a new trial.

On May 12, 1986, Battery World filed a Motion for Reconsideration to the Court of Appeals and argued its constitutional right to the jury verdict because the jury rendered a verdict in Battery World's favor based

---

[1] It is essential to note that in July 1982, at the request of Exide, a *second* oral contract was entered into with Battery World *which was never in dispute* and which formed the basis for the jury verdict in favor of Exide in the sum of $55,000 for the balance due on batteries sold and delivered to Battery World from July 1982 through October 1982.

[2] The Court of Appeals also misread or misconstrued several simple facts, too. For example, on page three of its decision, it states that Mr. Childers was an employee of Exide. Dan Childers *never* worked for Exide, and nowhere in the record is it stated that he was ever employed by Exide.

on conflicting evidence, and which verdict was supported by the trial judge on a Motion for New Trial. The Court of Appeals should not reverse and render against Battery World. To do so would exceed that court's function and authority. The Court of Appeals without opinion overruled that Motion on May 14, 1986. It also overruled Battery World's Motion to Certify the action to the Supreme Court on June 5, 1986.

On June 30, 1986, Battery World sought review before the Ohio Supreme Court on the grounds that it was improper for a reviewing court to invade the province of the jury, review conflicting evidence and substitute its own findings of fact completely opposed to those facts found by the jury. On August 25, 1986, the Ohio Supreme Court without opinion overruled that Motion. Again in a Motion for Rehearing before the Ohio Supreme Court, Battery World asserted the constitutional right to a jury verdict: weight and credibility are for the trier of facts, a reviewing court is not to reweigh the evidence and substitute its judgment for that of the jury and further for that of the trial court. On October 1, 1986, the Ohio Supreme Court again summarily denied Battery World's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

I. THE RIGHT TO A JURY TRIAL, ESPECIALLY THE RIGHT THAT NO FACT TRIED BY A JURY SHALL BE OTHERWISE REEXAMINED IN ANY COURT OF THE UNITED STATES THAN ACCORDING TO THE RULES OF THE COMMON LAW IS SO FUNDAMENTAL AND ESSENTIAL TO THE PROPER WORKING OF JUSTICE THAT THE SEVENTH AMENDMENT SHOULD BE RULED APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

In the present case, it is undisputable that the Ohio Court of Appeals, *sua sponte,* determined the critical factual issues, reexamined the record, and substituted its findings of fact for the jury's findings, despite the substantial evidence supporting the jury's verdict as verified by the trial court. A review of the Court of Appeals decision reveals this.

After the trial judge had denied Exide's Motion for Judgment Notwithstanding the Verdict on the grounds that there was "*evidence of probative value* to support the adverse party's claim and defense", Exide advanced only its Statute of Frauds argument. (Emphasis added.) The Court of Appeals rejected this argument, but then ruled that the "only debatable issue was the effective date of this agreement." (Page 9 of Court of Appeals Decision.) It compared and contrasted the evidence and testimony of the witnesses, opined as to what evidence was not conclusive, and then concluded that the "evidence *strongly suggests* that credit was not approved until July of 1982". (Emphasis added.) The phrase *strongly suggests* shows that the Court was reexamining and weighing the evidence and that it made its own conclusions from

the record, separate and apart and directly opposed to that of the jury. In so doing, it deprived Battery World of $165,000.00.

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

However, in *Walker v. Sauvinet*, 92 U.S. 90 (1875), this Court refused to apply the Seventh Amendment to the states.[3] We respectfully submit that the holding in *Walker* and its progeny should be reviewed and that the Seventh Amendment right to the prohibition of reexamination and substitution of facts upon appeal should be applied to the States. This right is basic in our system of jurisprudence.

Since the early days of America, the right to a civil jury has been considered fundamental. In the Virginia Bill of Rights, adopted on June 12, 1776, the Virginia Convention declared: "11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred." The Declaration of Independence included among the grievances against

---

[3] More recently, in *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), affirmed *Mayers v. Ellis*, 409 U.S. 943, *Hill v. McKeithen*, 409 U.S. 943, *Davis v. Edwards*, 409 U.S. 1098 (1972), this Court upheld a Louisiana District Court decision which ruled that the Louisiana statutory scheme which allows for appellate review of both facts and law is not unconstitutional under the Seventh Amendment.

England: "For depriving us in many cases of the benefit of Trial by Jury." The Massachusetts Bill of Rights in 1780 provided: "XV. In all controversies concerning property, and in all suits between two or more persons . . . the parties have a right to trial by jury, and this method of procedure shall be held sacred."

In *Parsons v. Bedford,* 3 Pet. 433, 446 (1830), this Court in discussing the Seventh Amendment noted that "trial by jury is justly dear to the American people." The absence of the right to a civil jury was "one of the strongest objections" against the Constitution. Congress sought to remedy this by immediately proposing the Seventh Amendment upon the adoption of the Constitution. The Court then stated that the ratification of the Seventh Amendment "establish[ed] its importance as a fundamental guarantee of the rights and liberties of the people." *Id.* The Court concluded its discussion by emphasizing that "the other clause of the Amendment is still more important; and we read it as a substantial and independent clause. '*No fact* tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law.' " *Id.* at 447. This Court reiterated these points in *Chicago, B. & Q. R. Co. v. City of Chicago,* 166 U.S. 226 (1897).

Several reasons make the jury system, especially the prohibition against reexamining findings of fact, fundamental to the American scheme of justice. First, the right to a civil jury trial is not only to protect the citizenry from tyrannical oppression, but also to invest that citizenry with an interest and participation in the government. Although the liberty (e.g., repu-

tation, fair housing and discrimination in employment) and property interests in civil cases are not adjudicated for the benefit of the state as they are in a criminal case, such interests are adjudicated through the power and instrumentality of the state. Accordingly, many of the same reasons for holding that the right to a jury trial is a fundamental right in a criminal case, *Duncan v. State of Louisiana,* 391 U.S. 145 (1968), are also applicable in a civil trial. Therefore, in civil matters the jury serves the national policy decision not to entrust plenary power over the citizenry to one judge or a group of judges, who may be compliant, biased or arbitrary.

Furthermore, the jury system gives the citizenry a direct share in the exercise of that power. Thus, when the jury renders its decision, the citizenry becomes once again part of the government. This reaffirms that the United States is a government *of the people.* Not to have the civil jury available in all of the states of the Union would severely undermine our federal system as a democratic institution. By participating in a jury, an individual experiences that the law of the government is his or her own law as well. To allow a large segment of the country, such as the citizenry of an entire state, to be excluded from the jury system will necessarily cause that segment to be alienated from the government, both at the state level and at the federal level. Accordingly, it is essential that this Court now hold that the civil jury is one of those fundamental principles of liberty and justice which lies at the base of all our civil and political institutions. To hold otherwise would be to condone its erosion and to weaken our system of justice.

The other reason which makes the Seventh Amendment a fundamental right, essential to a fair trial, is that it preserves adjudication of the facts on all the evidence and prevents adjudication from being based on speculation and suspicion. In *Tenant v. Peoria & P. U. By. Co.*, 321 U.S. 29, 35 (1944), this Court established the proper roles of the jury and the appellate courts:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. it is the jury, *not the court*, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. [Citations omitted] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict* merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

(Emphasis added.)

Examining the credibility of the witnesses is *critical.* Judging the demeanor, the voice inflection, the pauses when answering questions, the confidence, the gestures accompanying the testimony, body language and physical appearance will determine whether a given witness is believable or not. *Only the trier of fact seeing the witness can determine that.* A cold record will not show it, and a reviewing court reading the record is not in a position to make that determination. When the jury, sifting through the conflicting evidence, makes its findings of fact, it most likely does so because some witnesses were credible and others were not. Allowing an appellate court to make its own findings of fact always creates an unacceptable risk that the adjudication will be against the credibility of witnesses, and in most instances, probably is so. In other words, such judgments would be more the result of conjecture and prejudice than discernment and reason based on all the evidence and the credibility of all the witnesses.

The Constitution is intended to prevent such arbitrary and detrimental exercise of power by both the federal and state governments. In summary, the Seventh Amendment is a necessary protection against the misuse of power by the state courts, especially against the rendering of decisions by individuals who do not have the opportunity to fully and fairly evaluate the witnesses. Moreover, the Seventh Amendment vests in the citizenry a direct share of governmental power. As such it is a bulwark of our federal system, to insure that all of the citizens of all of the states participate equally in our government. Not to hold the Seventh Amendment applicable to the states inherently permits the state courts to deprive litigants

of a fair trial and to allow the erosion of the citizenry's franchise as jurors and usurp their function and role as the ultimate triers of fact.

II. IT WAS THE INTENTION OF THE DRAFTERS AND ADOPTERS OF THE FOURTEENTH AMENDMENT THAT THE FOURTEENTH AMENDMENT MAKE THE ENTIRE BILL OF RIGHTS, INCLUDING THE SEVENTH AMENDMENT, APPLICABLE TO THE STATES.

It is a fundamental principle of constitutional law that the intention of the framers is to be given effect when interpreting a given provision. Although this Court has declined to hold that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the states, in favor of a selective incorporation theory, Petitioner submits that it was the intention of the framers of the Fourteenth Amendment to apply the entire Bill of Rights to the states. Mr. Justice Black, in his dissent in *Adamson v. People of State of California,* 332 U.S. 46 (1947), and in his concurring opinion in *Duncan v. State of Louisiana, supra,* presents a very persuasive argument that such was *exactly* the intent of the framers. Mr. Justice Black, relying on his legislative experience as a Senator, knew that the comments of those who introduce legislation and steer it through Congress are the framers to look to when the real meaning of what is being offered is sought. *Duncan,* 391 U.S. at 165. Senator Howard, who introduced the Fourteenth Amendment in the Senate, elaborated on its intent as follows:

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution [the

> Senator had just read from the old opinion of Corfield v. Coryell, 6 Fed.Cas. 546, No. 3,230 (E.D.Pa.1825)]. To those privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each of all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and *his right to be tried by an impartial jury of the vicinage;* and also the right to be secure against excessive bail and against cruel and unusual punishments.
>
> * * * The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. Cong.Globe, 39th Cong., 1st Sess., 2765-2766 (1866).

Id. at 166-167. (Emphasis added.)

Mr. Bingham, who steered the Fourteenth Amendment through the House, stated the purpose of the amendment as follows:

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows: [Here Mr. Bingham recited verbatim the first eight articles.]
>
> These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, 'no State shall make or enforce any law shall abridge the privileges and immunities of citizens of the United States,' are an express prohibition upon every State of the Union, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as congress may make.

Cong.Globe App. 1st Sess. 42nd Cong., pp. 83-85, *Adamson*, 332 U.S. at 115 (Black, dissenting)

This unequivocally shows that the fourteenth Amendment was intended to apply the *entire* Bill of Rights, including the Seventh Amendment, to the states. The failure to so rule would be to thwart the intention of the framers of the Fourteenth Amend-

ment and allow the states to continue to abridge and experiment with the rights guaranteed by the Constitution to individual citizens of the United States, including the right to a trial by an impartial jury.

III. APPLICATION OF THE SEVENTH AMENDMENT TO THE STATES IS NECESSARY TO INSURE UNIFORMITY OF THE LAW AND TO PREVENT FORUM SHOPPING.

This Court has always supported the right to a jury trial and the jury's inviolate right to determine the facts free from appellate review. Moreover, this Court has not hesitated to impose these principles in a variety of federal-state interfaces.

In *Byrd v. Blue Ridge Rural Electric Co-Operative, Inc.*, 356 U.S. 525 (1958), a diversity case involving a claim for personal injuries, the Court reversed the court of appeals which had resolved uncertainties in the testimony "in a manner largely favorable to the respondent." *Id.* at 530, and then remanded the matter for a jury trial. This Court held that state statutes and rules could not disrupt the judge-jury relationship in the federal courts. Similarly, in *Simler v. Conner*, 372 U.S. 221 (1963), another diversity case, this Court reaffirmed the principle that "[t]he federal policy favoring jury trials is of historic and continuing strength." *Id.* at 222. It reversed and remanded the matter for a jury trial, despite the Court of Appeals' ruling that the claim was properly triable only before a judge.

More directly in FELA cases and Jones Act cases, this Court has in essence enforced the provisions of

the Seventh Amendment on the states. Interestingly, *Gallick v. Baltimore and Ohio Railroad Company*, 372 U.S. 108 (1963), followed the exact same procedural route to this Court as the present case. In *Gallick*, a FELA case, the jury answered various interrogatories, which indicated that the railroad was responsible for the injuries, and the trial court entered judgment accordingly. The Ohio Court of Appeals reversed and rendered holding that a directed verdict should have been entered because the trial evidence was insufficient to support the judgment. The Ohio Supreme Court refused to consider the case. On certiorari this Court reversed, ruling "that the *Ohio Court of Appeals improperly invaded the function and province of the jury.*" *Id.* at 113. (Emphasis added.) There was a conflict in the evidence, which legitimately raised a jury question. Once that minimal threshold standard was satisfied, the appellate court could not review the jury's findings. This Court reiterated its reasoning in *Tenant, supra*, quoted above, and concluded that "the lower appellate court had committed an *undue invasion of the jury's historic* function." *Id.* at 114-116. (Emphasis added.) Likewise, in *Arnold v. Panhandle and Santa Fe Railway Co.*, 353 U.S. 360 (1957), *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), *Lavender v. Kurn*, 327 U.S. 645 (1946), and *Tenant, supra*, this Court in FELA cases ruled that it was *improper for state appellate courts to invade the province of the jury and redetermine the facts.* This is the precise and identical issue presently before this Honorable Court.

Senko v. La Crosse Dredging Corporation, 352 U.S. 370 (1957), was a Jones Act case in which the jury had to determine whether the plaintiff was a member

of a ship's crew at the time of his injury. The Illinois Court of Appeals reexamined the facts and found that he was not a crew member, after the jury had reached the opposite conclusion. Once again this Court ruled that there was sufficient evidence presented to the jury to support its findings, and that accordingly the state court of appeals *acted improperly* in reexamining the facts and reaching its own conclusions.

Given that this Court has essentially already applied the Seventh Amendment to the states in the above cases, and given the reasons for those rulings, namely, the longstanding policy favoring the jury and the appellate court's inability to review the evidence, especially the credibility of witnesses, there is no valid distinguishing reason to apply the no reexamination of facts standards to the states in those cases and not per the Seventh Amendment *in all cases.*

Furthermore, there are very compelling reasons to apply the Seventh Amendment to the states now. It would eliminate the inconsistency noted above: applying the standard in FELA and Jones Act cases and diversity cases, but not requiring it in all cases. Moreover, it cannot be stressed enough that allowing appellate reexamination of facts permits arbitrary and capricious adjudication of cases. The appellate courts do not have the ability to assess the evidence and the witnesses accurately, rather more often than not they substitute their own biases or erroneous conclusions for facts. Such an injustice occurred in this case, and happens in many other cases. Not to apply the Seventh Amendment to the states would therefore deprive the citizens of the United States of a right guaranteed them by the Constitution. Justice Black, in his concurring opinion in *Duncan, supra,* at 170,

stated that the states, under the guise of federalism, should not deprive the citizens of their rights or even be able to experiment with those rights. Finally, we recommend to the Court its conclusion in *Rogers, supra,* at 510: "Special and important reasons for the grant of certiorari . . . are certainly present when . . . *state courts persistently deprive litigants of their right to a jury determination.*"

IV. AN APPELLATE COURT WHICH REEXAMINES THE RECORD MAKES ITS OWN FINDINGS OF FACT AND REVERSES AND RENDERS JUDGMENT THEREON DEPRIVES THE LITIGANT OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In *Cleveland Board of Education v. Loudermill,* No. 83-1362, 83-1363, 83-6392, 105 S.Ct. 1487, 1491 (1986), the Court reiterated the principle that "[p]roperty interests are not created by the Constitution they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." (Citations omitted)

In Ohio, the law mandates that the jury is the *sole* weigher of credibility and testimony and that it is not the province of the appellate court to determine credibility, reexamine the facts and substitute its judgment on factual matters. *McKay Machinery Co. v. Rodman,* 11 Ohio St.2d 77, 228 N.E.2d 304 (1967); *Buckeye bar, Inc. v. Liquor Control Comm.,* 32 Ohio App.2d 89, 288 N.E. 2d 318 (Franklin County 1972), and *Faulkner v. Pezeshki,* 44 Ohio App.2d 186, 337 N.E.2d 158 (Scioto County 1975).

Accordingly, there is a property right not only in the jury's verdict, but also in how that verdict will be considered on appellate review. When the Ohio Court of Appeals reexamined the facts de novo, and substituted its findings for the jury's findings, it deprived Battery World of its property, the $165,000.00 awarded by the jury, in violation of due process. The jury had correctly determined on the evidence that the parties had a contract from July 1981 to July 1982, which was breached by Exide, but the appellate court erroneously concluded that no such contract existed, despite the evidence being to the contrary. The Ohio Supreme Court compounded the problem by *summarily* failing to review the actions of the lower court. Ohio worked a grave injustice on Battery World. What happened was that the jury made a simple factual finding: Exide breached its oral contract. The Court of Appeals ignored the issue of law presented to them on appeal and instead adjudicated the matter on a final basis on an aberrant finding of fact: Exide did not breach a contract.

It is a fundamental principle of Constitutional law that once it is determined that the Due Process Clause applies, the question remains what process is due. The process due is a strict prohibition against appellate review of factual findings, and in those cases where an appellate court impermissibly makes its own findings of fact, there should be appellate review of that court to correct the injustice.

CONCLUSION

The Petitioners have been victims of injustice, because an appellate court has deprived them of a $165,000.00 jury verdict by impermissibly and erro-

neously making its own factual determinations. In doing so it violated Petitioners' Seventh Amendment right to a jury trial, free from the reexamination of factual matters, and deprived Petitioners of property without due process of law. Petitioners accordingly ask this Court to recognize as a Constitutional principle applicable to the states that appellate courts may not review factual findings by a jury, and substitute their own facts, to reverse the erroneous holding of the Ohio Court of Appeals and to remand the case for actions not inconsistent with the opinion of this Court.

In denying the Petitioners' federal constitutional rights, the Ohio Court of Appeals decided an important question of federal law which should be settled by this Court, and a writ of certiorari should issue to review the judgment and opinion of the Ohio Court of Appeals.

Respectfully submitted,

NICHOLAS M. DEVITO,
Counsel of Record for Petitioner
1000 Terminal Tower
Cleveland, Ohio 44113
(216) 687-1212

APPENDIX

The Supreme Court of Ohio
Columbus

1986 TERM
To wit: October 1, 1986
Case No. 86-1032

BATTERY WORLD, INC., *et al.*,

Appellants,

v.

EXIDE CORPORATION,

Appellee.

REHEARING ENTRY
(Cuyahoga County)

It is ordered by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ FRANK D. CELEBREZZE
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 1st day of October, 1986.

/s/ JAMES WM. KELLY CLERK

/s/ DANIEL J. CROWLEY DEPUTY

The Supreme Court of Ohio
Columbus

1986 TERM
To Wit: September 3, 1986
Case No. 86-1032

EXIDE CORPORATION,

Appellee,

v.

BATTERY WORLD, INC., *et al.*,

Appellants.

ENTRY

On written request of counsel for appellants it is ordered that the time for filing motion for rehearing is hereby extended to September 25, 1986.

/s/ FRANK D. CELEBREZZE
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court,to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 33rd [sic] day of September, 1986.

/s/ JAMES WM. KELLY CLERK

/s/ DANIEL J. CROWLEY DEPUTY

The Supreme Court of Ohio
Columbus

1986 TERM
To wit: August 25, 1986
Case No. 86-1032

BATTERY WORLD INC., *et al.*,

Appellants,

v.

EXIDE CORPORATION,

Appellee.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Nicholas M. DeVito.

/s/ FRANK D. CELEBREZZE
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

/s/ JAMES WM. KELLY CLERK

/s/ DANIEL J. CROWLEY DEPUTY

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
GERALD E. FUERST, CLERK OF COURTS

COURT OF APPEALS NO. 50527
LOWER COURT NO. C.P. 064,455
MOTION NO. 60712

EXIDE CORPORATION

Appellant

VS

BATTERY WORLD, INC., *et al*

Appellees

DATE JUN 5 1986

JOURNAL ENTRY

Motion by appellee to certify this action to the Supreme Court of Ohio is overruled.

ANN MCMANAMON, JR.,
PATTON, J., CONCUR

/s/ SAUL G. STILLMAN
Presiding Judge

SAUL G. STILLMAN

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
GERALD E. FUERST, CLERK OF COURTS

COURT OF APPEALS NO. 50527
LOWER COURT NO. C.P. 064,455
MOTION NO. 83929

EXIDE CORPORATION

Appellant

VS

BATTERY WORLD, INC., *et al*

Appellees

DATE MAY 14 1986

JOURNAL ENTRY

Motion by appellee for reconsideration is overruled.

ANN MCMANAMON, J.,
PATTON, J., CONCUR

/s/ SAUL G. STILLMAN
Presiding Judge
SAUL G. STILLMAN

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT COUNTY OF CUYAHOGA

No. 50527

EXIDE CORPORATION:
Plaintiff-Appellant

vs.

BATTERY WORLD, INC., *et al.*
Defendant-Appellees

JOURNAL ENTRY AND OPINION

DATE OF ANNOUNCEMENT OF DECISION: MAY 1 1986

CHARACTER OF PROCEEDINGS: CIVIL APPEAL FROM THE COMMON PLEAS COURT CASE NO. 064,455

JUDGMENT: REVERSED, IN PART; AFFIRMED, IN PART.

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellant:

HARRY W. GREENFIELD, ESQ.
Javitch & Eisen Co., L.P.A.
1050 Statler Office tower
1127 Euclid Avenue
Cleveland, Ohio 44115-1695

For Defendant-Appellees:

NICHOLAS M. DE VITO, ESQ.
Nicholas M. Devito & Assoc.
1000 Terminal Tower
Cleveland, Ohio 44113

STILLMAN, J.:

Exide Corporation filed its complaint in Common Pleas Court on September 20, 1983 naming an defendants Bat-

tery World, Inc. and Daniel and Judith Childers alleging that Battery World, Inc. owed it on account the sum of $71,748.02. For its second cause of action, Exide alleged that the Childers executed a Guaranty and Surety Agreement guaranteeing the full amount of all obligations or indebtedness of Battery World, Inc. to Exide Corporation.

On October 17, 1983, defendants filed an Answer and Counterclaim, alleging that as a result of plaintiff's breach of an agreement, they suffered damages in the amount of $150,000. For their second count, defendants claimed that as a result of the fraudulent misrepresentation of the plaintiff, they are entitled to recover $500,000 in compensatory damages and $1,500,000 in punitive damages.

The case went to arbitration and was appealed *do novo* by Exide Corporation. The case eventually proceeded to a jury trial which awarded to plaintiff the sum of $55,000 on its complaint and to the defendants the sum of $165,000 on its countercomplaint.

On May 21, 1985, plaintiff filed its motion for judgment notwithstanding the verdict or in the alternative, a new trial. This motion was denied on July 2, 1985 and this appeal follows.

Plaintiff has advanced the following assignments of error:

I. IT WAS ERROR FOR THE TRIAL COURT TO ALLOW JUDGMENT ON THE JURY VERDICT FOR BATTERY WORLD'S COUNTERCLAIM AGAINST EXIDE WHEN BATTERY WORLD'S ALLEGED CONTRACT WITH EXIDE EVIDENCED BY THE SEPTEMBER '81 M-41 DOCUMENT CANNOT BE RECOGNIZED AS A VALID SALES CONTRACT AS A MATTER OF LAW.

A. AN AGREEMENT WHICH IS NOT IN WRITING OR WHICH IS IN WRITING BUT LACKS A QUANTITY TERM DOES NOT MEET THE REQUIREMENTS OF THE STATUTE OF FRAUDS - OHIO REVISED CODE SECTION 1302.04 - AND THEREFORE CANNOT BE RECOGNIZED AS A LEGALLY BINDING SALES CONTRACT.

B. BATTERY WORLD CANNOT CLAIM RELIANCE AS AN EXCEPTION TO THE STATUTE OF FRAUDS, FOR BATTERY WORLD'S CONTRACT WITH LANE LANCO WAS ENTERED INTO BEFORE BATTERY WORLD COULD REASONABLY BELIEVE THAT IT HAD A CONTRACT WITH EXIDE.

II. IT WAS ERROR FOR THE TRIAL COURT TO ALLOW BATTERY WORLD'S EVIDENCE CONCERNING DAMAGES AS A RESULT OF EXIDE'S ALLEGED BREACH AND FRAUD WITH RESPECT TO A CONTRACT WITH BATTERY WORLD, FOR THE EVIDENCE ON DAMAGES WAS HEARSAY IN DIRECT VIOLATION OF OHIO EVIDENCE RULES 803(6) AND 1006.

The facts adduced at trial indicate that Dan Childers and David Callahan were employed with Exide. Sometime in July, 1981, they decided to leave the company and embark on a business of their own, the battery distribution business.

Sometime during that month, Callahan approached Ray Bradbury, a vice president in Marketing and Sales and informed him of their plan. They were desirous of becoming a customer of Exide for the purpose of purchasing batteries. Callahan made a specific request that they receive the same terms and conditions that an Exide customer by the name of Manufacturers Marketing had obtained. At this meeting, Bradbury called Bill Brooks into his office and directed him to carry out the terms of this agreement. One of the terms was known as a $77,000 price sheet. At this time there was nothing put in writing.

On September 18, 1981 an internal document known as an "M-41" was signed by Bill Brooks, a Vice President of Sales, in conjunction with Battery World, Inc. At the bottom of this form are the initials of Jack Mullins, Regional Credit manager, signed January 4, 1982. This is known as a "Customer Information Data" form. The only information on it is the address of Battery World, Inc., a customer code number and various shipping and pricing codes. Credit information such as the availability of financial statements and banking and trade references was not filled out on this form.

Kenneth Underwood, an area credit manager for Exide, testified with respect to the Battery World, Inc. account and the company's efforts to obtain credit information on this account. The evidence established that Battery World, Inc. could not become a customer of Exide unless and until it was assigned a customer code number and there was credit approval. (Tr. 26, 78). Both Callahan and Childers testified that they were aware they didn't have a deal with Exide until there was credit approval. (Callahan, Tr. 117-118; Childers, Tr. 286-287).

Underwood testified that the Credit Department receives the M-41 form which initiates the credit investigation. Battery World, Inc. was a new entity and had no established line of credit. They requested a Dun & Brad-

street which was not available. They also requested a list of operating accounts and credits which were not available.

On September 24, 1981, Jack Mullins wrote a letter to Childers requesting a copy of a financial statement and the name of his bank. On or about December 22, 1981, Exide received the name of the bank and mailed a request for information to the Twinsburg Banking Company. On or about January 28, 1982, this information was received by Exide which did not justify opening up a line of credit. At this point in time, Exide still required additional information.

The evidence also indicates that a second form M-41 was executed by Roy Poczebut, a division Sales Manager, which included Twinsburg Banking Company as a reference. This is dated March 22, 1982. This form also states that Childers is to provide a personal guaranty form to the Exide Credit Department. On or about march 23, 1982, Daniel and Judith Childers wrote a letter to Jack Mullins which they stated was to serve as a personal guaranty for all purchases with Exide made within six months from the date of that letter. At this time Exide did not have their personal financial statement.

A third form M-41 was completed by Roy Poczebut on April 18, 1982 which listed five trade references. Underwood stated that at this time they were in possession of Battery World, Inc.'s financial statement as of January 31, 1982.

On May 18, 1982, Jack Mullins wrote a letter to the Childers thanking them for their personal financial statement and requesting them to complete the enclosed guaranty form. On June 21, 1982 another request was mailed to the Childers to complete the guaranty form which was received by Exide on or about July 7, 1982. Underwood stated that on this day the company was willing to extend a line of credit to Battery World, Inc. on an open account.

Underwood stated that Mullins' initials at the bottom of the first M-41 did not necessarily mean that there was credit approval. He testified that it could have meant that he forwarded it back to the marketing Department for entry into the system. (Tr. 79). When asked to interpret the September, 1981 form M-41, Underwood stated that it indicated that the Sales Department had contacted the customer and that pending credit approval they could set up a specific price basis. (Tr. 29).

The evidence also established that in late 1981 Childers went to Pennsylvania accompanied by an Exide vice president, Bob Winkelman. Childers stated that during this trip he secured a major account by the name of Lane Lanco, in which Battery World, Inc. made a commitment to become its sole supplier. Lane Lanco placed an order of approximately $15,000 to $20,000 units in the first year. Childers testified that Battery World, Inc. made this commitment based upon the agreement that he understood the company had with Exide.

Battery World, Inc. placed an order of batteries with Exide sometime in December of 1981. In January of 1982, it was informed that Exide would not fill the order. Therefore, Battery World, Inc. was forced to secure other batteries in order to honor its agreement with Lane Lanco. Childers testified that he was informed by Jack Mullins that they had final credit approval in January of 1982 which entitled them to becoming an Exide customer.

Childers also testified that Callahan was responsible for marketing and he was essentially the chief executive officer responsible for the day-to-day operation of the company. Childers approved all sales contracts. Childers also testified with respect to the increased costs Battery World, Inc. incurred as a result of having to purchase batteries from an establishment known as Crown Battery. Callahan testified that the increased cost was approximately $10 per battery. Childers testified that the increased costs were

anywhere from $9.50 to $11 per battery. (Tr. 243). Childers also admitted that they secured the Lane lanco account without having credit approval from Exide. (Tr. 262).

Ray Poczebut testified that the Credit Department asked for financial statements, both business and personal, in the Spring of 1982. He stated that before selling batteries to Battery World, Inc., Exide needed the personal guaranty of the Childers which was not received until July of 1982. He further stated that there are two types of credit approval, when the account is initially set up and every order that is made is subject to credit approval. A form 3-81 shows the final credit approval which was not entered into evidence.

Bruce Rockwell, Director of National Sales, testified that a customer code number gives access to a computer and is used internally for purposes of sales. The number means nothing as far as credit approval is concerned. No approval is possible until the Credit Department has all the necessary information.

I.

Appellant first contends that the judgment on appellee's counterclaim is contrary to law as the September 28, 1981 form M-41 cannot be recognized as a valid sales contract. Appellant advances two grounds to support this contention. First, appellant claims that the Statute of Frauds applies since a sale of goods over $500 requires a writing. R.C. 1302.04 (U.C.C.2-201). Appellant argues that the M-41 does not contain the quantity term, a term essential to satisfy the Statute of Frauds.

Second, appellant argues that appellee cannot claim reliance as an exception to the Statute of Frauds since its contract with Lane Lanco was was entered into before it could reasonably believe that it had a contract with the appellant.

We are unpersuaded by appellant's reliance on a Statute of Frauds argument for the reason that both by way of pleading (Reply to defendants' counterclaim filed June 12, 1984) and at trial it was admitted by the appellant that there was in fact an agreement. The only debatable issue was the effective date of this agreement. (Tr. 319-320).

R.C. 1302.04(C)(2) provides:

> (C) A contract which does not satisfy the requirements of Division (A) of this section but which is valid in other respects is enforceable:
>
> * * *
>
> (2) If the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or * * *

Comment 7 to this statute provides:

> 7. If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection against fraud. Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

Appellant's position is that a contract was not finalized until July of 1982 at which time it received the personal guaranty of the Childers which resulted in credit approval. It was not until this time that Battery World, Inc. became a customer of Exide.

According to Childers, however, he was told by Brooks that they had final credit approval in January of 1982. (Tr. 197-198). In his deposition read at trial, Brooks stated that since he was not in the Credit Department, he did not know whether Battery World, Inc. was ever approved for credit. (Brooks Deposition, pp. 65-66). Brooks also identified the September 18, 1981 form M-41 and stated that it is an internal record of the Sales and Marketing Departments and does not signify that Battery World, Inc. had been approved as a customer. (Brooks Deposition, p. 21).

The evidence established that all parties understood that credit approval was a prerequisite to becoming a customer of Exide. Both Callahan and Childers admitted that they contracted with Lane Lanco sometime late in 1981 before they obtained final credit approval from Exide.

In his letter written to Childers on September 24, 1981, Mullins requested a copy of a financial statement and the name of their bank with reference to opening up a line of credit. On or about December 22, 1981, Exide received the name of the bank and sent out a request for information on this same day. The corporate financial statement was not received until sometime in March or April of 1982. Also, on the second form M-41 dated March 22, 1982, there is a notation that Childers was to provide a personal guaranty to the Credit Department. The Childers' personal financial statement was received in May, 1982. The personal guaranty was received in July, 1982.

Although Childers testified that Battery World, Inc. entered into the contract with Lane Lanco, based upon the assurances of Exide executives that they would have an agreement (Tr. 206), there was no indication from the evidence with respect to *when* there would be credit approval. Therefore, back in 1981 when Battery World, Inc. agreed with Lane Lanco to be its sole supplier of batteries, it did so at its own peril since credit approval with Exide

would possibly be established at some undetermined time in the future.

We are of the opinion that Mullins' initials and the January 4, 1982 date in the September 18, 1981 M-41 are not conclusive as to credit approval. Also, although Childers testified that Brooks told him they had credit approval in January, Brooks stated he never knew whether Battery World, Inc. was approved for credit. Also, Childers was aware that Exide needed to see a financial statement. This was not supplied until sometime in March or April.

The evidence strongly suggests that credit was not approved until July of 1982 when the Childers provided Exide with a personal guaranty.

Although we reject appellant's Statute of Frauds argument, we sustain appellant's first assigned error on the basis that a contract was not in existence until credit was approved, which occurred in July 1982.

Appellant's first assigned error is well taken.

II.

Appellant next contends that Battery World, Inc's testimony on damages on the counterclaim was inadmissible hearsay, in violation of Evid. R. 803(6) and 1006.

Callahan testified that Battery World, Inc. incurred increased costs of approximately $10 per battery as a result of Exide's alleged breach. Callahan testified that he had nothing to verify this figure. (Tr. 174). A motion to strike this testimony was made and overruled by the court.

Childers testified the increased costs ranged from $9.50 to $11 per battery and based his testimony on defense Exhibit C, a summary of losses incurred by Battery World, Inc. It was argued by defense counsel that this was a summary of ordinary business records and therefore admissible. (Tr. 209). Appellant objected and argued in re-

sponse that the documents used in preparing the summary were requested and never produced for inspection. (Tr. 209-210).

At the onset we note that Evid. R. 803(6) does not apply since it deals only with the admissibility of records kept in the course of a regularly conducted business activity. Defense Exhibit C is not such a record, but is a summary purportedly compiled from business records. Evid. R. 1006 deals with summaries and provides as follows:

RULE 1006. SUMMARIES

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

The Ohio rule is identical to the federal rule. This rule requires that the writings be voluminous. The purpose of this rule is to allow the use of summaries when documents are unmanageable or when they would be useful to a jury. *Davis & Cox* v. *Summa Corp.* (C.A. 9, 1985), 751 F.2d 1507. Also, a proper foundation must be laid prior to a summary's admission. *In re Mendlowitz* (1967), 9 Ohio App.2d 83, 88-89. The rule also requires that the originals or underlying documents be made available to the opposing party for inspection. *Petticrew* v. *Petticrew* (1953), 98 Ohio App. 260, 266-267; *Hackett* v. *Hous. Auth. of the city of San Antonio* (C.A. 5 1985), 750 F.2d 1308, 1312; *Paddack* v. *Christensen, Inc.* (C.A. 9, 1984), 745 F.2d 1254.

A party's failure to produce these documents renders the summary inadmissible. *Hackett, supra,* at 1312.

Appellee argues that Childers' testimony with respect to damages was not hearsay as it was based on personal knowledge and his intimate knowledge of the business operation and damages suffered. Whereas this may satisfy the foundation requirement of the rule, it does not satisfy the rule's requirement that the underlying documents be provided to the opposing party. They were in fact requested and never produced. Consequently, appellant was unable to cross-examine Childers in his testimony.

When questioned by the court where the records were kept, Childers replied that they were in Ohio, stored at 65th and Clark. (Tr. 208-209). Appellant was never given the opportunity to inspect these records.

For these reasons, we sustain appellant's second assigned error.

Judgment reversed as to Battery World, Inc's recovery on the counterclaim; balance of the judgment in favor of Exide Corporation is affirmed.

This cause is reversed in part and affirmed in part.

It is, therefore, considered that said appellant recover of said appellees its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to rule 27 of the rules of Appellate Procedure.

ANN McMANAMON, P.J., and
PATTON, J., CONCUR.

/s/ SAUL G. STILLMAN
JUDGE
SAUL G. STILLMAN

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of appellate Procedure. This is

an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CASE NO. CV-64455

EXIDE CORPORATION

Plaintiff,

-vs-

BATTERY WORLD, INC., *et al.*

Defendant.

JUDGE WILLIAM BROWN
BY ASSIGNMENT

JOURNAL ENTRY

On the 8th day of May, 1985, the Jury returned a verdict in favor of the Plaintiff against the Defendant on the Plaintiff's Complaint in the sum of $55,000.00 and the Jury further found in favor of the Defendant against the Plaintiff on Defendant's Counter-claim in the sum of $165,000.00.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that judgment be rendered for the Plaintiff against the Defendant in the sum of $55,000.00 together with interest at 10% per annum from May 8, 1985 and further judgment is rendered for the Defendant against the Plaintiff in the sum of $165,000.00 together with interest at 10% per annum from May 8, 1985.

IT IS FURTHER ORDERED that each party bear its own costs.

/s/ WILLIAM F. BROWN
Judge William Brown

Approved by:

Harry W. Greenfield
JAVITCH & EISEN CO., L.P.A.
Attorney for Plaintiff
1050 Statler Office Tower
1127 Euclid Ave.
Cleveland, OH 44115-1695

Nick DeVito Attorney for Defendant
1000 Terminal Tower
Cleveland, Ohio 44113

IN THE COURT OF COMMON PLEAS
STATE OF OHIO
COUNTY OF CUYAHOGA

CASE NO. CV-64455

EXIDE CORPORATION,

Plaintiff,

vs.

BATTERY WORLD, INC., *et al.*,

Defendants.

ORDER

William F. Brown, J.:
(Sitting by assignment, Coshocton, Ohio)

This cause came on for hearing on June 7, 1985, on plaintiff's motion, pursuant to rule 50(b) of the Ohio Rules of Civil Procedure to set aside the verdict entered in this cause on May 8, 1985, and replace it with a judgment in favor of plaintiff on grounds that there was no evidence of substantial probative value to support the verdict rendered by the jury and the judgment entered pursuant thereto.

In the alternative, plaintiff's motion seeks an order from this Court, pursuant to Rule 59(A)(5), (6) and (7) of the Ohio Rules of Civil Procedure to set aside the verdict and judgment entered pursuant thereto and grant plaintiff a new trial on the grounds that the damages awarded to plaintiff and defendant (cross complainant), Battery World, Inc., were erroneous, the judgment was not sustained by the weight of the evidence and the judgment is contrary to law.

The Court has reviewed the arguments of counsel and the evidence adduced and finds that there is sufficient

evidence to permit reasonable minds to reach different conclusions; there is some evidence of probative value to support the adverse party's claim and defense.

As to plaintiff's assertion that there was error in the amount of recovery and that the judgment is not sustained by the weight of the evidence, under the circumstances of this case and in light of the evidence adduced, this Court cannot supplant the judgment of the jury with its own and must refuse to do so.

As to the claim that the judgment is contrary to law, this Court does not so find.

Being fully advised, IT IS ORDERED that plaintiff's motion for judgment notwithstanding the verdict or in the alternative, to grant a new trial, is denied.

/s/ WILLIAM F. BROWN
William F. Brown, Judge
(Sitting by assignment, Coshocton, Ohio)

June 7, 1985.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trail by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.